



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

December 10, 2024

Testing, Testing, 1, 2, 3

Part 3: The Americans with Disabilities Act

As one of the few attorneys who can perform math more complex than converting minutes into tenths-of-an-hour, I wanted to take just one or two tenths-of-an-hour of your time (1-12 minutes) to discuss an often-overlooked aspect of retention, promotion, and hiring decisionmaking: employee and applicant testing. There are a few sources of legal authority on this topic: Title VII, Executive Order 11246 (federal contractors and subcontractors only), and the ADA. [Part 1 of this series covered agency guidance arising out of Title VII.](#) [Part 2 covered OFCCP guidelines to federal contractors and subcontractors covered by Executive Order 11246.](#) This article, the final part in this series, discusses how the Americans with Disabilities Act impacts applicant and employee testing.

Agency authority disclaimer: This includes discussion of the ADA itself, the EEOC's regulations implementing the ADA at 29 C.F.R. Part 1630, and subregulatory guidance. The ADA grants the EEOC what is generally referred to as legislative authority, a broad directive to "issue regulations...to carry out" the statute. Notwithstanding this, the same deference does not apply to subregulatory guidance; and, any interpretative agency action must still be within Constitutional limits and an outcome of reasoned decisionmaking.

Who's covered? Employers of 15 or more employees.

What does the ADA have to say about employee/applicant testing?

One, the obligation to provide reasonable accommodations extends to both qualified employees and qualified applicants with disabilities. For instance, if an employer's application form isn't accessible by a visually-impaired applicant's text-to-speech software, then the employer could assist the applicant to complete the form by phone or could accept a printed copy of the application even if it otherwise required applications to be submitted online for applicant tracking software purposes.

Two, the EEOC regulates employers' abilities to administer medical exams. What is and what isn't a medical exam is subject to a seven-factor analysis. Two of those factors are whether the test is administered by a health care professional and whether the test is interpreted by a health care professional.

What's the takeaway for covered employers?

- 1.) Designate a point person – ideally not the hiring manager – to respond to reasonable accommodation requests during the application process.

- 2.) Make sure your job postings and advertisements identify that the employer will provide reasonable accommodations during the application process.
- 3.) Don't let the time to identify or implement a reasonable accommodation result in detriment to the requesting applicant. For instance, let's say a Company's hiring process has phases consisting of the initial application, an online test, a Zoom interview with peers, and an in-person interview with decisionmakers, and that the number of applicants progressing to each phase is narrowed. If a qualified applicant is selected for an online test, but the testing software is incompatible with a visually-impaired applicant's text-to-speech reader, then the visually-impaired applicant should have the opportunity to complete the test by alternative means before any applicants move to the interview phase of the process.

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.